

No. 45816-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

vs.

Aaron Linder,

Respondent.

Cowlitz County Superior Court Cause No. 13-1-00868-5

The Honorable Judge Stephen Warning

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....	1
ARGUMENT.....	3
The trial court properly ordered suppression of the evidence.	3
A. Standard of Review	3
B. The trial court properly excluded the evidence, because the executing officer failed to comply with a material provision of CrR 2.3(d).....	4
CONCLUSION	10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>United States v. Gantt</i> , 194 F.3d 987 (9th Cir. 1999)	5
<i>United States v. W.R. Grace</i> , 526 F.3d 499 (9th Cir. 2008)	5

WASHINGTON STATE CASES

<i>Diaz v. State</i> , 175 Wn.2d 457, 285 P.3d 873 (2012).....	3
<i>Hundtofte v. Encarnacion</i> , -- Wn.2d --, 330 P.3d 168 (Wash. 2014)	4
<i>Johnson v. Horizon Fisheries, LLC</i> , 148 Wn. App. 628, 201 P.3d 346 (2009).....	3
<i>State v. Aase</i> , 121 Wn. App. 558, 89 P.3d 721 (2004)	5, 8
<i>State v. Bonds</i> , 98 Wn.2d 1, 653 P.2d 1024 (1982)	6
<i>State v. Bowman</i> , 8 Wn. App. 148, 504 P.2d 1148 (1972)	7
<i>State v. Kern</i> , 81 Wn. App. 308, 914 P.2d 114 (1996)	8
<i>State v. Parker</i> , 28 Wn. App. 425, 626 P.2d 508 (1981)	1, 2, 7, 8, 9
<i>State v. Richards</i> , 136 Wn.2d 361, 962 P.2d 118 (1998).....	7
<i>State v. Smith</i> , 15 Wn. App. 716, 552 P.2d 1059 (1976)	7
<i>State v. Temple</i> , 170 Wn. App. 156, 285 P.3d 149 (2012)	8
<i>State v. Wraspir</i> , 20 Wn. App. 626, 581 P.2d 182 (1978)	4, 8
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007).....	4
<i>Will v. Frontier Contractors, Inc.</i> , 121 Wn. App. 119, 89 P.3d 242 (2004).....	3

WASHINGTON STATUTES

RCW 10.31.040 6

OTHER AUTHORITIES

CR 41 3

CrR 2.3..... 2, 3, 4, 5, 6, 7, 8, 9

JCrR 2.10 7

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After he pulled his car over to the side of the road, Aaron Linder was approached by Kalama Police Chief Grant Gibson. RP 23-26. Gibson arrested him for driving while suspended. RP 26. Mr. Linder was searched, and found in possession of a small tin box that said “Wrigley” on it. RP 26. He refused to grant Gibson consent to open the box. RP 28. When taken to the police station, he again refused to consent to a search. RP 29.

Mr. Linder told Gibson that the box contained items that Gibson “would characterize or summarize as drug paraphernalia.” RP 27. He admitted to daily drug use, and said the box contained foil and “hoopdies,” which he described as plastic tubes used to inhale fumes from drugs heated on the foil. RP 27-28.

At the police station, a dog alerted to the tin, indicating the presence of drugs. RP 7-8. The dog’s handler, Sergeant Steven Parker, applied for and obtained a search warrant for the box; however, when he opened the box and inventoried its contents, he did so without anyone else present. RP 10-15.

Parker did not know that he was required to have another person present when he conducted the inventory. RP 21.

When Gibson returned to work, he retrieved the box from a temporary storage locker, examined its contents, and compared what he found to Parker's inventory. RP 30-32. No one else was present when Gibson made the comparison. RP 32. Like Parker, Gibson was unaware of the requirement that another person be present during the inventory. RP 34.

Mr. Linder was charged with possession of methamphetamine. CP 1. He moved to suppress the evidence, arguing that the officers violated the portion of CrR 2.3(d)¹ that requires the officer to conduct the inventory in the presence of the property owner or another person CP 5-8.

Cowlitz County Superior Court Judge Steven Warning heard the testimony of the two officers and the arguments of both parties. RP 3-52. He concluded that the provision of CrR 2.3(d) requiring the presence of a person other than the officer is more than ministerial. Instead, Judge Warning reasoned that "[t]he main purpose of CrR 2.3(d) is to avoid the

¹ Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt, The return shall be made promptly and shall be accompanied by a written inventory of any property taken, The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer, The court shall upon request provide a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. CrR 2.3(d).

uncertainties associated with one person being present during a search.”

CP 19-24. The court concluded that

Absent suppression, there is no adequate remedy for a violation of CrR 2.3(d). A defendant’s only recourse would be to testify that, for example, there were no drugs in the container. Such testimony would be pitted against the word of a police officer. From common experience, this places defendant at a disadvantage. CP 23.

Judge Warning suppressed the evidence and dismissed the prosecution. CP 19-24. The state appealed. CP 25, 26.

ARGUMENT

THE TRIAL COURT PROPERLY ORDERED SUPPRESSION OF THE EVIDENCE.

A. Standard of Review

The Court of Appeals applies an “abuse of discretion” standard when it reviews a trial court’s order dismissing a case for failure to comply with court rules. *See Johnson v. Horizon Fisheries, LLC*, 148 Wn. App. 628, 636, 201 P.3d 346 (2009) (addressing CR 41(b)); *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 128, 89 P.3d 242 (2004) (same). Similarly, a trial court’s decision excluding evidence on non-constitutional grounds is reviewed for abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012).

This is a deferential standard of review. *State v. Young*, 160 Wn.2d 799, 805, 161 P.3d 967 (2007). A trial court abuses its discretion by issuing a ruling that is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Hundtofte v. Encarnacion*, -- Wn.2d --, ___, 330 P.3d 168, 172 (Wash. 2014).

- B. The trial court properly excluded the evidence, because the executing officer failed to comply with a material provision of CrR 2.3(d).

Under CrR 2.3(d), a peace officer must inventory any property seized pursuant to a search warrant. The inventory “shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer.” CrR 2.3(d). The purpose of the rule is “to safeguard, if possible, against errors, willful or inadvertent, by one officer acting alone.” *State v. Wraspir*, 20 Wn. App. 626, 629, 581 P.2d 182 (1978).

The rule grants the property owner some assurance that the officer will handle the seized property with care, that the evidence will not go missing, and that no evidence will be planted. Similarly, the rule protects the executing officer from subsequent accusations of carelessness or malfeasance.

An inventory conducted in the absence of some “person other than the officer” violates the rule and protects neither the property’s owner nor

the officer conducting the inventory. CrR 2.3(d). Should the matter proceed to court, the only witness to the officer's conduct will be the officer himself or herself.

Recognizing this, the trial court in this case concluded that this portion of CrR 2.3(d) serves more than a ministerial function. CP 23-24. As the court noted, a violation of this part of the rule cannot be remedied after the fact. CP 23-24. This distinguishes the provision from the other requirements of CrR 2.3, which have been found to be ministerial or merely procedural. *See, e.g., State v. Aase*, 121 Wn. App. 558, 565, 89 P.3d 721 (2004) (addressing 3-minute delay in providing a copy of the warrant).²

Because the relevant portion of CrR 2.3(d) protects substantive interests, the trial court properly concluded that violation of the rule requires suppression. CP 19-24. Suppression of the evidence provides a remedy to the property owner and encourages police departments to familiarize their officers with the requirements of the rule.

Furthermore, suppression is consistent with the approach taken in related areas of the law. For example, the Supreme Court balances the costs and benefits of suppression when evidence is obtained through an

² But see *United States v. Gantt*, 194 F.3d 987 (9th Cir. 1999) *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008).

illegality that falls short of a constitutional violation and does not violate Washington law. *State v. Bonds*, 98 Wn.2d 1, 11, 653 P.2d 1024 (1982).

In *Bonds*, the Supreme Court addressed evidence obtained (in part) through violation of Oregon's extradition statute. The court noted that the exclusionary rule

should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means.

Id., at 12. The court balanced these factors and ultimately found that they weighed in favor of admission. *Id.*, at 14.

If applied in this context, all three factors outlined in *Bonds* weigh in favor of suppression. Suppression for failure to comply with the relevant portion of CrR 2.3(d) will protect privacy rights, deter police misconduct, and preserve the dignity of the judiciary. *Id.*, at 12-14.

Similarly, two of the three purposes that underlie RCW 10.31.040 (the "knock and wait" statute) support suppression in this case. That statute was enacted "(1) to reduce the potential for violence to both occupants and police arising from an unannounced entry; (2) to prevent unnecessary destruction of property; and (3) to protect the occupants' right to privacy." *State v. Richards*, 136 Wn.2d 361, 371-72, 962 P.2d 118

(1998). Although compliance with CrR 2.3(d) will have little to no effect on any potential for violence, following the rule helps safeguard property and protect the right to privacy. *Id.*

These principles, although not directly applicable in this context, support the trial court's decision in this case.

Appellant suggests that *all* parts of CrR 2.3(d) are ministerial, and thus violation of CrR 2.3(d) will *never* require suppression absent a showing of prejudice. Appellant's Opening Brief, pp. 7-15. This is incorrect.

All of the cases cited by Appellant can be distinguished, because they relate only to violations of CrR 2.3(d) that could have been remedied after the fact.³ Where an officer mistakenly serves an unsigned copy of a valid warrant, the problem could be remedied by providing a signed copy. *State v. Parker*, 28 Wn. App. 425, 426, 626 P.2d 508 (1981). Where an officer reads the warrant out loud in the presence of the defendant and provides a copy to the homeowner, any defect in personal service on the defendant could be remedied by providing a copy after the fact. *State v. Bowman*, 8 Wn. App. 148, 150, 504 P.2d 1148 (1972). Where an officer

³ One case cited by Appellant does not address a violation of CrR 2.3. *State v. Smith*, 15 Wn. App. 716, 719, 552 P.2d 1059 (1976) (addressing former JCrR 2.10 (1974)). This long-expired rule does not appear to have served the purposes underlying CrR 2.3. Because of this, violation of former JCrR 2.10 (1974) cannot be compared to a violation of CrR 2.3(d).

files the inventory and warrant return before the warrant is executed, any problems could be remedied by filing the materials again, after execution of the warrant. *State v. Kern*, 81 Wn. App. 308, 318, 914 P.2d 114 (1996).⁴

Although two of the cases cited by Appellant concern the specific provision at issue here, those cases are consistent with the trial court's ruling. First, in *Wraspir*, the Court of Appeals concluded that a second officer can qualify as the "person other than the officer" referenced by the rule. *Wraspir*, 20 Wn. App. at 629-630. In this case, Sergeant Parker inventoried the evidence by himself. No other officer was present.

Second, in *Temple*, the defendant conceded that a violation of CrR 2.3(d) did not invalidate the search warrant. *State v. Temple*, 170 Wn. App. 156, 161, 285 P.3d 149 (2012). Accordingly, the *Temple* court did not address the issue. Instead, the defendant argued that multiple problems with the warrant combined to create constitutional error. The Court of Appeals rejected this argument. *Id.*

Here, by contrast, Mr. Linder does not make the concession made by the defendant in *Temple*. Furthermore, Mr. Linder does not argue a

⁴ Appellant also cited *Aase*. But *Aase* involved compliance with, rather than violation of, the rule. *Aase*, 121 Wn. App. at 564 (finding that substantial evidence establishes that the officer "provided a copy of the warrant to Aase 'at the time of the search.'")

constitutional error based on problems with execution of the warrant.

Finally, it does not appear that either the defendant or the Court of Appeals in *Temple* considered the difference between violations that can be remedied after the fact and those that cannot. *Id.*

Sergeant Parker violated Mr. Linder's substantial rights by failing to inventory his property in the presence of another person. Mr. Linder did not have the opportunity to observe the inventory himself, and will not be able to test Sergeant Parker's recollections against those of a second witness. Neither of these problems can be remedied now that the inventory is complete.

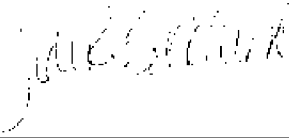
Because of this, the trial court correctly suppressed the evidence. CrR 2.3(d). The lower court's decision must be upheld.

CONCLUSION

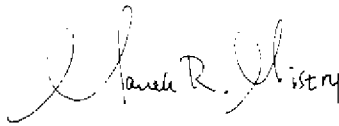
The trial court properly suppressed the items seized. The court's order must be affirmed.

Respectfully submitted on September 2, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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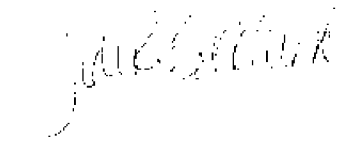
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 2, 2014.



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